FILED
DEC 30 2002
OFFICE OF THE CLERK

No. 02-923

IN THE

Supreme Court of the United States

WALTER E. MCDONALD,
Petitioner

v.

EXXONMOBIL CHEMICAL COMPANY

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Although Respondent ExxonMobil Chemical Co. ("ExxonMobil"), by its letter dated December 18, 2002 and addressed to the Clerk of the Court, has formally waived its right to file a brief in opposition to the Petition for Writ of Certiorari and, pursuant to Supreme Court Rule 15.2, has waived any and all objections to, and any and all arguments against, the Petitioner's Questions Presented, Petitioner's Statement of the Case, and the Petitioner's Reasons for Granting the Writ, ExxonMobil nevertheless suggests in its same letter that the Petition should be denied for reasons allegedly articulated by District Court Judge Rainey. Since ExxonMobil apparently seeks to adopt by reference reasons allegedly articulated by District Court Judge Rainey rather than affirmatively presenting to this Court any argument of ExxonMobil's own, the Petitioner respectfully submits this short Reply Brief in order to address the solitary reference made by District Court Judge Rainey related to Petitioner's Questions Presented to this Court of whether a court may grant summary judgment to an employer when: 1) a plaintiff-employee has presented a *prima facie* case of an unlawful discriminatory employment practice and, 2) the employer has admitted in deposition, and employer documents, that the employer's purported legitimate and non-discriminatory explanation for adverse action against the plaintiff-employee, which the employer reported to the U.S. Equal Employment Opportunity Commission ("EEOC"), is false, fictitious and fraudulent.

District Court Judge Rainey's sole acknowledgment of the Questions Presented to this Court is in the form of Footnote 1 to his decision. Rather than providing any basis for denying the Petition, however, Judge Rainey's footnote only proves the following beyond any doubt:

1) ExxonMobil asserted as its *sole defense* to Petitioner's *prima facie* case of retaliation that its offer to Petitioner of continued employment in the newly merged corporation, conditioned upon the Petitioner working for Mike Rosenberger, could not have been in retaliation for the Petitioner's complaint of racial discrimination filed against Rosenberger because, *according to ExxonMobil*, Petitioner only first complained about Rosenberger *after* ExxonMobil had offered Petitioner a position working for Rosenberger. ExxonMobil asserted this defense because, as this Court knows, there can be no retaliation claim where the plaintiff has not engaged in protected activity *prior to*, and related to, the complained of allegedly "retaliatory" adverse action. Judge Rainey commented, "ExxonMobil is apparently convinced that the real reason for McDonald's sudden dissatisfaction with Rosenberger and his subsequent complaint of discrimination is ExxonMobil's decision to offer McDonald continued employment." Judge Rainey's comment confirms that ExxonMobil asserted to the District Court, as it previously had asserted to the EEOC, that the Petitioner only complained *subsequent* to ExxonMobil's offer of continued employment working for Rosenberger.

However, as fully explained in the Petition, ExxonMobil's admissions in deposition and in ExxonMobil documents clearly establish that Petitioner filed a complaint against Rosenberger with ExxonMobil more than a month *before* any offer of continued employment and that ExxonMobil's sole defense to the Petitioner's *prima facie* case of retaliation was knowingly and willfully false, fictitious, fraudulent and a blatant lie.

2) Judge Rainey failed as a matter of law and of consistency with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000), and failed in the context of the summary judgment standard, to properly analyze the uncontroverted evidence – the admissions on the part of ExxonMobil – that ExxonMobil's sole defense to Petitioner's *prima facie* case of retaliation was knowingly and willfully false, fictitious, fraudulent and a blatant lie. Remarkably, in spite of, and in direct contradiction to, ExxonMobil's admissions that its defense had been a blatant lie, Judge Rainey, for reasons unexplained and about which Petitioner can only speculate, asserted that it was "highly dubious" that ExxonMobil lied. In stark contrast to Judge Rainey's comment, it appears that even ExxonMobil, by its choice to waive its right to file a brief in opposition to the Petition, is now uncomfortable with making any affirmative and direct argument to this Court that it did not lie -- let alone claiming it is dubious that it lied -- in the face of evidence only to the contrary. Judge Rainey acknowledged Petitioner argued at length that summary judgment for ExxonMobil was inappropriate under *Reeves* given the clear evidence of ExxonMobil's lie.

Under these circumstances, Judge Rainey's comment that "even if ExxonMobil did lie to the EEOC ... this lie was unrelated to ExxonMobil's asserted reasons for its employment decisions and is irrelevant to the Court's decision on the pending motion" only further demonstrates that Judge Rainey misapplied the analytical framework set forth by this Court in *Reeves*, or Judge Rainey failed to apply the *Reeves* framework altogether.[1]

This Court should grant a Writ of Certiorari for the reasons fully set forth in the Petition, and to make it unmistakably clear to courts that it is inappropriate, and a perversion of the system and the laws established to protect American workers, for a court to grant summary judgment to employers who have knowingly and willfully presented false, fictitious and fraudulent explanations for their adverse employment actions to the EEOC and to the courts.

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[1] ExxonMobil's lie is clearly related, as evidenced by the facts that: 1) the lie, if believed, negates the *required* retaliation element that the Petitioner must have engaged in protected activity *prior to* complained of adverse action, 2) ExxonMobil has continuously repeated this lie to the EEOC and the courts, 3) ExxonMobil has steadfastly refused to recant this lie although it has not refuted the evidence that it is a lie, and 4) ExxonMobil does not contest Petitioner's characterization of this lie as ExxonMobil's *sole defense*.

Such employers should be prosecuted to the fullest extent of the law under 18 U.S.C. § 1001, and counsel who aid and abet them should be disciplined by the bar of the court, rather than rewarded for their callous trampling of the rights of American workers.

Respectfully submitted,

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Dated: 12/27/02